DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED
MAR 18 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing Procedures	)	
to Be Followed When Formal Complaints	)	
Are Filed Against Common Carriers	)	

COMMENTS OF BELL ATLANTIC[1]

The Commission should grant in part the three reconsideration petitions that show that the 1996 Act requires that many more complaints than the Commission specified must be decided within five months.[2] There is no justification, however, for limiting those fast-track complaints to only those relating in some way to "competition," for applying the rules retroactively to pending complaints, or to allowing "extraordinary" discovery, as MCI requests. Finally, the Commission should grant the requests of AT&T Corp. and ACTA to require service of complaints on not just a carrier's representative in the District of Columbia but also on one or more additional representatives that may have decision-making authority.

---

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

[2] ***See*** petitions filed by MCI Telecommunications Corporation ("MCI"), AirTouch Paging ("AirTouch"), and America's Carriers Telecommunications Association ("ACTA").

Section 208(b)(1), as amended by the 1996 Act, requires the Commission to decide within five months complaints concerning "the lawfulness of a charge, classification, regulation, or practice" of a carrier. 47 U.S.C. § 208(b)(1). The Commission interpreted this language as applying the five-month deadline only to complaints involving matters required to be in carriers' tariffs or that would be in tariffs but for forbearance from requiring tariffs. ***Report and Order***, 12 FCC Rcd 22497, ¶ 37 (1997) ("Order"). As the reconsideration petitions demonstrate, however, the statutory requirement is broader. On its face, the statute applies the five-month deadline to "any investigation" into any carrier "practices," AirTouch at 5, including the many carrier practices that are not covered by a tariff. ACTA at 1-2. As a result, under the "plain language" doctrine, "any investigation" that involves a carrier's "practices," whether or not subject to tariff, must be resolved within five months. ***See Reiter v. Sonotone Corp.***, 442 U.S. 330, 339 (1979). By limiting the five-month deadline to only certain investigations of carrier practices (those involving tariffs), therefore, the Commission's rules are at odds with the plain language of the statute.

Besides the statutory requirement, the Commission's limited reading could result in disputes as to whether a practice would have been tariffed but for forbearance in order to determine if the five-month complaint deadline applies. It would make no sense for the Commission to encourage such needless disputes that do not go to the merits of the complaint.

In any event, even if the Act did not require all complaints to be resolved within five months (as it does), the Commission should still adhere to the deadline as a matter of policy in order to ensure that all complaints are resolved as quickly as possible. If the carrier's practice that is the subject of the complaint is unlawful, the complainant continues to suffer harm until the matter is resolved. If the practice is lawful, the uncertainty should be cleared up quickly. There

is no justification, however, to limit the short deadline only to "competition-related" matters, as MCI requests. MCI at 4-5. Practices that are unrelated to competition can have just as much of an adverse impact on the complainant and can generate an equal amount of uncertainty for the defendant carrier as competition matters. And MCI's proposal would simply spawn useless and wasteful litigation as to whether a particular practice is "competition-related."

There is no justification for MCI's request that all pending "competition-related" complaints be resolved under the new rules. MCI at 4-5. While the Commission should clear up pending complaints quickly to end uncertainty and limit potential damages, applying the new rules to pending proceedings could actually delay a decision. It would require the Commission and the parties to change course in the middle of a proceeding, discard filings already made under the old rules, and begin again under the new. Some of these complaints are in discovery, some in briefing, while some are fully briefed and are awaiting decision. Starting all of these proceedings again, as MCI wants, would overload the Commission and the parties and prevent a timely decision.

The Commission should also reject MCI's call for additional "extraordinary" discovery. Allowing additional discovery will over-burden a process that the Commission is attempting to streamline. Disputes over the discovery have been the single most contentious non-substantive issue in the complaint process. Despite the prior rule which limited discovery to thirty interrogatories, many parties, including MCI, have almost invariably initially filed the full complement of thirty permitted interrogatories, then have sought approval to file still more.

Many of the requests are broad, open-ended, and burdensome.[3] It was this process, with its inherent delays, that the Commission hoped to prevent by limiting discovery to fifteen interrogatories. Giving parties an opportunity to request "extraordinary" discovery will simply encourage parties to engage in the type of fishing expedition that occurred under the old rules, then claim they need "extraordinary" discovery when their motions to compel are denied.

Moreover, as the Commission points out, the Commission's rules require fact pleading, while courts generally require only notice pleading. Order at ¶ 120. With notice pleading, the parties use discovery to ascertain the facts to support their claims. Under the Commission's processes, the parties must allege facts sufficient to prove a claim at the time of filing, and discovery should be used only to fill in a few factual gaps that can easily be accommodated in fifteen interrogatories. ***Id.***

Even courts with notice pleading have taken steps to limit discovery. In 1993 Rule 26 of the Federal Rules of Civil Procedures was amended to give federal courts the ability to limit discovery, and a number of courts have done so. ***See, e.g.***, Local Rule CV-26, Easterrn District, Texas, under which each case is assigned to one of six "tracks," each with its tightly circumscribed amount of discovery, from no discovery at all to a specified number of interrogatories, requests for admission, and depositions. Federal Rule 26 was amended, after extensive study, because "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an

---

[3] For example, it is not unusual for a party to ask another to identify all documents dating from divestiture that relate in any way to some broad issue. For a company the size of Bell Atlantic, it could take months of search to identify all of the requested material. When the Commission limits the scope of discovery, the filing party responds with another barrage of interrogatories, and the process begins anew.

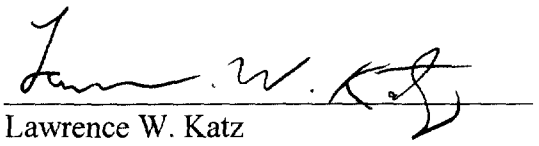
instrument for delay and oppression." 146 F.R.D. 638 (1993).[4] Adopting MCI's proposal would simply invite the kind of abuse that the Commission has experienced in the past, and that the Federal courts have taken action to avoid.

Finally, the Commission should grant the requests of AT&T and ACTA to require service of complaints not just on a representative in Washington, D.C. but on one or more additional representatives. AT&T suggests that the complainant should serve the person or persons who can be expected to have requisite knowledge of the issue and who has authority to resolve the dispute. AT&T at 3. In this way, the complaint will not sit in a mail drop or an in-box of someone who is on vacation while the brief time for reply runs out. As ACTA suggests,

[4] The abuses of the discovery process that led to amendment of Rule 26 are analyzed in detail in Griffin Terry, Comment: *A Critical Analysis of the Formulation and Content of the 1993 Amendments to the Federal Rules of Civil Procedure*, 63 U. CIN. L. REV. 869, 912-938 (1995). ***See, also*** Angela R. Lang, Note: *Mandatory Disclosure Can Improve the Discovery System*, 70 IND. L.J. 657 (1995).

such additional service should be either by hand, fax, or overnight mail. ACTA at 5-6. In any event, to ensure timely notice, the Commission should still require that the designated representative in the District of Columbia receive personal service of the complaint by hand delivery.

Respectfully Submitted,



Lawrence W. Katz

Michael E. Glover
Of Counsel

1320 North Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-4862

Attorney for the Bell Atlantic
Telephone Companies

March 18, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 1998 a copy of the foregoing "Comments of Bell Atlantic" was sent by first class mail, postage prepaid, to the attached list.

Tracey M. DeVaux

Tracey M. DeVaux

* Via hand delivery.

ITS, Inc.*
1919 M Street, NW
Room 246
Washington, DC 20554

J. Carl Wilson, Jr.
Lisa Smith
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Mark Rosenblum
Ava Kleinman
James Bolin
AT&T Corp.
Room 3252J1
295 North Maple Ridge Avenue
Basking Ridge, NJ 07920

Charles Helein
Helein & Associates
8180 Greensboro Drive
Suite 700
McLean, VA 22102

Counsel for ACTA

Mark Stachiw
Vice President & General Counsel
AirTouch Paging
Three Forest Plaza
12221 Merit Drive
Suite 800
Dallas, TX 75251

Carl Northrop
E. Aston Johnston
Paul, Hastings, Janofsky & Walker LLP
1229 Pennsylvania Avenue, NW
10th Floor
Washington, DC 20004-2400

Counsel for AirTouch Paging